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NO. 80-

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD SULLIVAN,

Petitioner,

-AGAINST-

PERINI NORTH RIVER ASSOCIATES AND HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a construction worker whose principal duties are performed on actual navigable water in the construction of a sewage control project to eliminate pollution of a navigable river and who sustains on such waters a work related injury, is a person engaged in maritime employment within the meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. §901 et seq.

2. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act withdrew coverage for construction workers whose principal duties are performed on actual navigable waters and deprived them of the benefits which they would have had under the 1927 Act.

TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 3

Statutory Provision Involved 4

Statement of The Case 4

Statement of Fact 10

Reasons For Granting The Writ 13

I. The Second Circuits Conclusion interpreting the term "maritime Employment" as Excluding Water Based Construction Workers Whose Principal Duties are Performed on Actual Navigable Water Has Been Decided in a Way Which is Not in Accordance With P. C. Pfeiffer Co. v. Ford and other Applicable De-- cisions of This Court 13

II. Petitioner, Sullivan, a Construction Worker, Whose Principal Duties Were Performed on, Over and In Actual Navigable Water In the Construction of a Water Pollution Control Pro--- ject and Whose Regular Assigned Duties Consisted of Mooring Barges, Unloading Cargo Barges, Hooking Cargo to Cranes on Barges and Stacking Cargo is a Person Engaged in "Maritime Employment" Within the Meaning of

§902(3) of the Longshoremen's and Harbor Workers' Compensation Act as Amended..... 30

Conclusion 47

TABLE OF AUTHORITIES

Cases: Page

Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962 18,26

Davis v. Department of Labor & Industries, 317 U.S. 249 17

Dixon v. Oosting, 238 F. Supp. 25 (1965) 18

Fusco v. Perini North River Associates, 601 F. 2d 659 (2nd Circ. 1979) 2,6,7,8,23

Fusco v. Perini North River Associates, 622 F. 2d 1111 (2nd Circ. 1980) 2,3,9,10,40

Hardaway Contracting Co. v. O'Keeffe, 414 F. 2d 657 (1968 18

Merrit-Chapman & Scott v. Bassett, 50 F. Supp. 488 (1943) 17

Matson v. Perini North River Associates BRB No. 78-563 (February 21, 1979) 46

Nacirema Operating Co. v. Johnson,

Page

396 U.S. 212 (1969) 18

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977) ...15,16,22

Odom Construction Co. v. U.S. Department of Labor, 622 F. 2d 110 (1980) 43,45

Perini North River Associates v. Fusco, Sup. Ct. of U.S. Oct. Term 1979, No.79-759, 48 L.W. 3451 100 S. Ct. 697 2,9

P. C. Pfeiffer Comapny Inc. v. Ford, 444 U.S.____, 100 S. Ct. 328 (1979).14,15,24,25,27,28,34,38,39,41,42

Peter v. Arrien. 325 F. Supp. 1361 (1971) aff'd 463 F. 2d 252 (1972). 18

Ronald Fusco v. Perini North River Associates Case No 76 LHCA-927 ... 3

Bernard Sullivan v. Perini North River Associates Case No. 77 LHCA-85 3,5,6

Travelers Insurance Co. v. Branham 136 F. 2d 873 (1943) 17

STATUTES: PAGE

Clean Water Act of 1977, Pub. L. 95-217,91 Stat. 1566 (1977) 33 U.S.C.A. §1251 et seq.....11,31,32

Page

Federal Water Pollution Control Act, Amendments of 1972, PuB.L. 92-500, 86 Stat. 816 (1972)....11,31,32

Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §§901-950 (1976) 33 U.S.C. §902(3)(1976).....4,6,8,10,14,19 20,27,30,33,40,41

33 U.S.C. §903(a) (1976).....7,18,19

28 U.S.C. §1254(1) 4

MISCELLANEOUS:

S. Rep. 9201125, 92d Cong., 2d Sess. (1972) 21

Reog. Plan No.3 of 1970, 3 CFR 1072 (1966-1970 Compilation), reprinted in 5 U.S.C. App., at 609 (1970) and in 84 Stat. 2086 (1970) 31

APPENDIX*

Page

Appendix A—

Opinion of The United States Court of Appeals for the Second Circuit dated June 4, 1980 ..... A2

Appendix B—

Decision and Order of the United States Court of Appeals for the Second Circuit denying Rehearing and Rehearing En Banc dated August 19, 1980 ..... A6

Appendix C—

Decision and Order of the United States Supreme Court dated January 14, 1980 ..... A8

Appendix D—

Opinion of the United States Court of Appeals for the Second Circuit dated June 29, 1980 ..... A9

Appendix E—

Decision and Order of the United States Court of Appeals for the Second Circuit denying Rehearing and Rehearing En Banc dated August 21, 1980 ..... A32

Appendix F—

Decision and Order of the Benefits Review Board of the Department of Labor, together with the dissenting opinion of Member Miller A36

Appendix G—

Decision and Order of the Administrative Law Judge in the Case of Ronald Fusco A87

Appendix H—

Decision and Order of the Administrative Law Judge in the Case of Bernard Sullivan A96

Appendix I—

Statutory Provisions involved ... A103

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*Appendices are not reproduced herein but are contained in Petition for a Writ of Certiorari of Ronald Fusco.

IN THE

SUPREME COURT OF THE UNITED STATES

BERNARD SULLIVAN,

Petitioner,

-against-

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT and INDEMNITY CO.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Bernard Sullivan,* respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of

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* In addition to the parties listed in the caption, the Director, Office of Workers' Compensation Programs, United States Department of Labor and Ronald Fusco participated in the case and were petitioners in the United States Court of Appeals for the Second Circuit.

Appeals for the Second Circuit entered on June 4, 1980 denying coverage of his claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. (1970 ed. Supp. V 1975). That decision entered on remand from the Supreme Court of the United States reversed the opinion and judgment of the Second Circuit Court of Appeals entered on June 29, 1979 which held that petitioner was a person engaged in maritime employment and covered under the Act.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix, hereinafter "App.", A) is dated June 4, 1980 and reported at 622 F. 2d 1111. A timely Petition for Rehearing and Rehearing En Banc was denied by Order dated August 19, 1980 (App. B). The Order of the United States Supreme Court dated January 14, 1980 at 100 S. Ct. 697, 48 L.W. 3451 (App. C). The Opinion of the Court of Appeals is dated June 29, 1979 and reported 601 F. 2d 659 (App. D). The Petition for Re-

hearing and Rehearing En Banc was denied by Order dated August 21, 1979 (App. E). The decision of the Benefits Review Board of the Department of Labor and dissenting opinion of Member Miller dated November 30, 1978 and January 19, 1979, respectively (App. F) is reported at 9 BRBS 378.* The Administrative Law Judge decision in the case of Ronald Fusco was filed on December 28, 1977 (App. G). The Administrative Law Judge decision in the case of Bernard Sullivan was filed on August 26, 1977 (App. H).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1980. On August 19, 1980, the Second Circuit denied Petitioner, Bernard

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* The Benefits Review Board Service (BRBS) is the unofficial reporter of the Board's decisions.

Sullivan's timely Petition for Rehearing and Rehearing En Banc.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §902(3) (1970 ed. & Supp. V is set forth as Appendix I).

STATEMENT OF THE CASE

Petitioner, Bernard Sullivan sustained a work related injury while employed by Perini North River Associates on the site of the North River Pollution Control Project. He filed a claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as

amended 86 Stat. 1251, 33 U.S.C. §901, et seq. (1970 ed., Supp. V). Perini controverted the claim on the issue of coverage and the claim was referred to the Office of Administrative Law Judges for a formal hearing.

The Administrative Law Judge after conducting a formal hearing rejected the claim on the ground that Sullivan was not covered under the Act. Bernard Sullivan v. Perini North River Associates, Case No. 77-LHCA-85 (A96).

Sullivan took an appeal to the Benefits Review Board. The Board consolidated his claim with three other claims arising out of the North River Pollution Control Project for the purpose of review since they involved common questions of law and fact. The Board (Member Miller dissenting) in a decision dated November 30, 1978 affirmed the

Administrative Law Judge decision and held that Sullivan was not engaged in maritime employment within the meaning of §902(3) of the Act, 33 U.S.C. §902(3) and not covered under the Act. (A36).

Sullivan then filed a Petition for review of the Board's decision in the United States Court of Appeals for the Second Circuit. Another employee, Ronald Fusco and the Director, Office of Workers' Compensation Programs also filed petitions in the Second Circuit for review of the Board's decision contending that the Benefits Review Board erred as a matter of law in determining that these claimants were not covered by the Act.

The Second Circuit reversed the decision of the Benefits Review Board and granted the petitions of Sullivan and Fusco. In it's decision dated June 29, 1979 the Court stated:

> Weighing all relevant factors, we interpet the phrase "person engaged in maritime employment" geographically so as to include any person whose principal duties are performed on navigable waters as that term was understood before 1972. In this case we have no occasion to decide whether the critical phrase also includes a person whose principal duties are on land but who suffers work-related injuries while performing duties upon navigable waters. Fusco v. Perini North River Associates, 601 F. 2d 659 at 669 (2nd Cir. 1979) (A29).

Concluding that the purpose of Congress in amending the Longshoremen's Act was to extend and not to withdraw eligibility, the Court held that since Sullivan performed his principal duties upon navigable waters as that term was defined in §3(a) of the original 1927 Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U.S.C. §903(a) and sustained on such waters a work-related injury, he was engaged in

maritime employment within the meaning of §902(3) of the Act, as amended in 1972. 601 F. 2d at 669 (A30).

Perini North River Associates and Hartford Accident and Indemnity Company then filed a petition to the Second Circuit Court of Appeals requesting rehearing and rehearing en banc. The petition was denied on August 21, 1979. 601 F. 2d 659 at 670 (A32).

Perini North River Associates and Hartford Accident and Indemnity Company then filed a Petition for a Writ of Certiorari in the Supreme Court of the United States to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated June 29, 1979. In granting the petition for a writ of certiorari, the Supreme Court vacated the judgment and remanded the case to the Second Circuit for fur-

ther consideration in light of P. C. Pfeiffer Co. v. Ford, 444 U.S. ___, 100 S. Ct. 328 (Nov. 27, 1979). Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Blackmun dissenting. Perini North River Associates v. Fusco, Sup. Ct. of U.S. Oct. Term 1979, No. 79-759, 48 L. W. 3451, 100 S. Ct. 697 (A8).

The United States Court of Appeals for the Second Circuit on remand from the Supreme Court of the United States issued an opinion on June 4, 1980 denying the petition of Bernard Sullivan. In reversing their original opinion which had held that Sullivan was a covered employee under the Act, the Court now held that although the principal duties of Sullivan were performed on navigable water in the construction of the substructure extending over the water for a project to eliminate pollution of

navigable waters, he was not a person engaged in maritime employment or a harborworker within the meaning of §902(3) of the Act, as amended. Fusco v. Perini North River Associates, 622 F. 2d 1111 (2nd Cir. 1980) (A5).

After the Second Circuit opinion was issued, Bernard Sullivan filed a timely petition to the Second Circuit Court of Appeals requesting rehearing and rehearing en banc. The petition for rehearing and rehearing en banc was denied on August 19, 1980 (A7).

STATEMENT OF FACT

Bernard Sullivan worked for Perini North River Associates on the North River Pollution Control Project as a wire lather for 16 months before his injury on September 11, 1975.

Perini was constructing a

concrete substructure or foundation for a sewage treatment facility to be located on the Hudson River in the vicinity of West 138th Street, New York City. The substructure was to be built in the navigable waters and to extend approximately 500 feet into the Hudson River to the pier head and 2000 feet along the length of the river.

The facility had been contracted by the City of New York and was being constructed with federal funding contributed by the United States Environmental Protection Agency pursuant to the Federal Water Pollution Control Act (33 U.S.C.A. §1251 et. seq.). The Act authorized Congress to provide funds for the erection of such harbor facilities to eliminate pollution in the navigable waters.

Perini had contracted with the

City of New York for the construction of the substructure in the river. The sewage treatment facility was to be erected upon the substructure at a later date.

Perini's work consisted of driving caissons (or piles) into the river bed, filling the caissons with steel reinforcement rods and concrete and connecting the caissons by horizontal beams above the water. The final step was to pour a concrete slab over the caissons and beams.

Sullivan worked for 16 months on, in and over the river. His regular assigned duties consisted in building caissons out over the water in barges, dropping caissons into the river from barges, reinforcing concrete with steel and working on the beams which at high tide were submerged causing him to stand

in the water. Two or three times a week, he was assigned to unload cargo and steel from barges towed by tugboats. The unloading required him to tie up and moor the barges to caissons, board the barges, hook the cargo to cranes and stack the cargo at the places where it was to be used.

On the day of his injury, Sullivan was standing 12 inches above the water installing beams on caissons about 150 feet out in the river from shore. As he was helping to pass a 30 foot steel rod into a connecting beam to reinforce it, he sustained an injury to his back.

REASONS FOR GRANTING THE WRIT

1. The Second Circuits Conclusion Interpreting The Term "Maritime Employment" as Excluding Water Based Construction Workers

> Whose Principal Duties Are Performed On Actual Navigable Water Has Been Decided in A Way Which is Not in Accordance With P. C. Pfeiffer Co. v. Ford And Other Applicable Decisions of This Court.

The issue in P. C. Pfeiffer v. Ford, 444 U.S. ___, 100 S. Ct. 328 (1979) was whether two employees who worked in a covered shoreside situs were persons engaged in "maritime employment" within the meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 902(3)).

> The issue in this case thus becomes whether Ford and Bryant are the kind of land-based employees that Congress intended to encompass within the term "maritime employment." 100 S. Ct. at 337.

The Supreme Court was not presented with the question of coverage for water based employees whose regular work activities are over, on and in actual navigable water nor did it have to con-

sider whether workers who were covered under the pre-1972 Act remained covered after the 1972 Amendments to the Act.

Recognizing that "maritime employment" as used in §902(3) is not confined solely to longshoring operations, the Supreme Court noted:

> -----But the language of §2(3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. ..." 33 U.S.C. §902(3). The petitioner's argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" comprise a part of the larger group of activities that make up "maritime employment." See Webster's New Collegiate Dictionary 581 (1973). 100 S. Ct. at 334, n.7.

Similarly, Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 involved two shoreside employees, not

workers who were regularly assigned to perform their duties on actual navigable water. The question of coverage for water based employment or the question of whether employees covered before the 1972 Amendments remained covered after was not considered. However, the Supreme Court was cognizant of both of these issues when it stated:

> As the definition of employees makes clear, the category of persons engaged in maritime employment includes more than longshoremen and persons engaged in longshoring operations. It is, however, unnecessary in this case to look beyond these two subcategories.
>
> This case also does not involve the question whether Congress excluded people who would have been covered before the 1972 Amendments, that is, workers who are injured on navigable waters as previously defined. See Weyerhaeuser Co. v. Gilmore, 528 F. 2d 957 (CA9) cert. denied, 429 U.S. 868, 50 L Ed 2d 148, 97 S. Ct. 179 (1976). 432 U.S. at 265 n.25 (1977).

Construction workers performing their work on actual navigable water have been traditionally covered under the Longshoremen's and Harbor Workers' Compensation Act. Prior to the 1972 Amendments, numerous cases involving construction workers have been sustained as being within the Coverage of the Act. Among those found to be covered were a labor foreman who fell from a barge constructed to pour concrete into an underwater foundation, Travelers Insurance Co. v. Branham, 136 F. 2d 873 (4th Cir. 1943); a carpenter constructing a lighthouse foundation, Merrit-Chapman & Scott Corp. v. Bassett, 50 F. Supp. 488 (1943); a structural steel worker dismantling a bridge, Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225 (1942); employee engaged in construction of bridge piers, Hardaway

Contracting Co. v. O'Keeffe, 414 F. 2d 657 (1968); a pile driver, Dixon v. Oosting, 238 F. Supp. 25 (1965); a crane operator demolishing a bridge, Peter v. Arrien, 463 F. 2d 252 (1972).

Prior to the 1972 amendments, the Act covered all work related unjuries to employees sustained on navigable water excluding only a master or member of a crew of any vessel and any person engaged by the master to load or unload or repair any small vessel under eighteen tons net, 33 U.S.C. § 903(a), Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), 82 S. Ct. 1196. The Act extended its coverage to employees who were involved in construction on navigable water. All doubt as to coverage of construction workers injured on navigable water was removed by the case of Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969) and

the sole question in determining coverage under the Act was whether the worker was injured on navigable water.

Landward extension of the coverage of the Act by the 1972 Amendments was reactive to the unfairness of coverage as determined by the situs of the accident. Congress responded and expanded the physical boundaries of the Act's coverage in 1972 by amending §3(a), 33 U.S.C. §903(a). Evidently, this expansion landward would draw into coverage workers who were land based and not traditional maritime workers. The definition of employee in §2(3), 33 U.S.C. §902(3) was also amended to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repair, shipbuilder, and ship-breaker

----." This amended section failed to define "maritime employment" or "harbor-worker."

The expansion of navigable water brought a multitude of additional land based workers, who were not previously covered, within the situs coverage of the amended Act. In order to avoid covering every worker who found himself within the confines of these newly covered shoreside areas, Congress made it clear that only those engaged in maritime employment would be covered. The intended effect of the amended definition of §2(3) was to limit the employments to which the Act's coverage on shore would apply. The amended definition of employee in §2(3) accomplished such a result by creating a status test of eligibility, that is, engaged in maritime employment, for the

newly included shoreside areas. There is no evidence of any Congressional intent to narrow the class of workers that were eligible for benefits prior to 1972 and withdraw Coverage from them.

The legislative history of the 1972 Amendments to the Act supports the construction that Congress did not intend to exclude employees traditionally covered who were injured while regularly working on actual navigable water. The Senate report, S. Rep. No. 92-1125, 92nd Cong. 2nd Sess. at 16 (1972) demonstrates the Congressional intention:

> "Section 2(a) amends §2(3) of the Act to define an "employee" as any person engaged in maritime employment. The definition specifically includes any longshoreman or other person engaged in longshoring operations, and any harborworker, including a ship repairman, shipbuilder and shipbreaker. It does not exclude other employees traditionally covered but retains that part of §2(3)

> which excludes from the definition of "employee" masters, crew members or persons engaged by the master to unload, load or repair vessels of less than 18 tons net." [Emphasis added].

The Congressional intent not to treat employees regularly assigned to work on and in actual navigable waters in the same manner as persons injured on the newly expanded shoreside areas is bolstered by the affirmative statement that the definition of an "employee" does not exclude other employees traditionally covered. The 1972 amendments of the Act were designed to expand the Act's coverage to protect and bring within its coverage additional workers and not to exclude workers regularly assigned to perform their duties on actual navigable water and who were traditionally covered prior to the amendments.

In Northeast Marine Terminal

Co. Inc. V. Caputo, the Supreme Court in the first paragraph of the decision stated:

> In 1972 Congress amended the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 33 USCS §§901 et seq. [33 USCS §§901 et seq.], in substantial part to "extend [the Act's] coverage to protect additional workers." S Rep No. 92-1125, p1 (1972) (hereinafter S Rep). 432 U.S. 249 at 251 (1977).

The Second Circuit in the original opinion dated June 29, 1979 recognized that Congress enacted the 1972 Amendments to the Act to protect additional workers. The Court analyzed the legislative history extensively in it's opinion, Fusco v. Perini North River Associates, 601 F. 2d 659 and concluded that Congress did not intend to exclude marine construction workers whose principal duties were performed on

navigable water.

On remand, the Second Circuit, despite cognizance of the legislative intent, denied coverage tc Sullivan, clearly a marine construction worker, thereby withdrawing coverage from employees whose principal duties are performed on navigable water. The effect of this determination is to withdraw coverage under the Amended Act from a class of workers who were traditionally covered before 1972. Conspicuously, in this opinion, the Court elides over the legislative history and the clearly expressed intent of Congress to broaden coverage to protect additional workers. The opinion is not harmonious with the intent explicitly expressed by the Supreme Court in P. C. Pfeiffer Company Inc v. Ford that "The Act now extends coverage to more workers ....," 100 S.

Ct. 328 at 332 and that the Act was amended to "extend [the Act's] coverage to protect additional workers" as stated in Northeast Marine Terminal v. Caputo, 432 U.S. 249 at 251.

The Second Circuit's interpretation of P. C. Pfeiffer v. Ford, supra, overlooks the issue with which the Supreme Court was confronted. Two land based employees who didnot work on actual navigable water were involved. The employer contended that the amended Act covered employees who worked or may be assigned to work over actual water. The Supreme Court rejected this geograpical test as being repugnant to the landward expansion of the Act and refused to restrict coverage for maritime employment to work performed on actual water. However, it does not follow from the Supreme Courts occupational approach

to land based employment that it would deny coverage to employment performed on actual water. To deny coverage to employees regularly assigned to work on navigable water would be to resurrect the "maritime but local" doctrine which was laid to rest by the Supreme Court in Calbeck v. Travelers Insurance Co. 370 U.S. 114 (1962).

Landbased employees are within the coverage of the Act because of the relationship between their work and some enterprise involving navigable water. Employees such as marine construction workers who work on, over and in actual water are distinguishable in that they are confronted with conditions that are maritime and do not require a nexus between what they do and an enterprise involving navigable water. They are directly involved in maritime employment

because their principal duties are performed on the water. Both the situs and status standards are met by the nature of their work which includes their use of barges, tugboats, rafts and other marine equipment. Their labor is expended on the water and they are exposed to the same risks and perils of the sea as experienced by other maritime workers. Unlike the landbased employees in P. C. Pfeiffer Company Inc. v. Ford, supra, the marine construction worker does not require an indirect connection with navigable water to bring him within the Act's coverage.

The phrase "maritime employment" as used in §2(3) does focus primarily on occupations, but not exclusively. This is illustrated by the fact that longshoremen are specifically included, as well as harbor workers; the former

group being classified by occupation and the latter by a geographical classification. The situs and status test are therefore related and significantly overlap each other. In certain cases both tests are met by proof of a single fact, that is, that an injured employee's regular duties are performed on actual navigable water. When the work being performed is on land, as in P. C. Pfeiffer v. Ford, supra, the overlap of the two tests disappears. The separate tests for situs and status become distinct. When a landbased employee is injured on a shoreside situs, only the occupational elements in the concept of maritime employment can bring him within the Act's coverage.

The question in P. C. Pfeiffer v. Ford, supra, was whether the coverage of the Act extended to certain landbased

employees. 100 S. Ct. 328 at 337. The Court did not consider coverage of employment on actual navigable water and did not address that subject. The Court considered Congressional intent with respect to the newly expanded shoreside coverage and concluded that there would coverage for shoreside employees whose work was occupationally maritime. The Court didnot consider the question of the Act's coverage of employment on actual water nor did it state that the Act excluded such employment from coverage.

In excluding marine construction workers and depriving this class of workers of benefits that they would have enjoyed prior to 1972, the Second Circuit's opinion is in conflict with the legislative intent of expanding coverage to protect additional workers. The issue of coverage for these employees

should be resolved by the Court.

2. Petitioner, Sullivan, a Construction Worker, Whose Principal Duties were Performed On, Over and In Actual Navigable Water in the Construction of a Water Pollution Control Project and Whose Regular assigned Duties Consisted of Mooring Barges, Unloading Cargo Barges, Hooking Cargo to Cranes on Barges and Stacking Cargo is a Person Engaged in "Maritime Employment" Within the Meaning of §902(3) of the Longshoremen's and Harbor Workers' Compensation Act as Amended.

Perini North River Associates, Petitioner's employer was engaged in the construction of a foundation for a sewage treatment facility which was to extend at least 500 feet from shore into the Hudson River. The facility was called the North River Pollution Control Project. The project had been contracted by the City of New York with financing

by the United States Enviromental Protection Agency. The Enviromental Protection Agency was created in 1970. Reorg. Plan No.3 of 1970, 3 CFR 1072 (1966-1970 Compilation), reprinted in 5 U.S.C. app., at 609 (1970) and in 84 Stat. 2086 (1970).

In 1972 Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816. These amendments together with the Clean Water Act of 1977, Pub. L. 95-217, 91 Stat. 1566 (amending the 1972 amendments) established the methods for control of pollution in navigable waters by the Enviromental Protection Agency. They are set forth in Title 33, Navigation and Navigable Waters, of the United States Code Annotated, 33 U.S.C.A. §1251 et seq. (A104).

The purpose clearly expressed

in §1251(1)(2) of the Federal Water Pollution Control Act (A104) was to eliminate the discharge of pollutants into the navigable waters and to restore and maintain the chemical, physical and biological integrity of the Nation's waters for "the protection and propagation of fish, shellfish and wildlife and [provide] for recreation in and on the water." 33 U.S.C.A. §1251(1)(2). Construction of the North River Pollution Control Project directly resulted from these acts. Federal funds financed this project. The erection of this facility was to clean the Hudson River of pollution and this objective had a significant relationship to navigation and commerce. When completed, the effect upon the river from the operation of this facility could not have had a more obvious purpose than to augment and enhance the naviga-

tion of the river.

Irrespective of the fact that the facility being constructed had a maritime purpose, Sullivan was an employee injured on actual navigable water whose assigned work activities satisfied the status test of §902(3). 33 U.S.C. §902(3).

The substructure being erected was in actuality a concrete pier extending into the river and would alter the characteristics of the harbor. Sullivan's work was the type of job performed by a typical harborworker. However, the total of all of his assigned duties constituted maritime employment.

Section 902(3) which contains the "status" standard defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshor-

ing operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker....." 33 U.S.C. §902(3) [Emphasis added].

In P. C. Pfeiffer Company, Inc v. Ford, supra, the Supreme Court in defining the Act's occupational requirements stated that "The term "maritime employment" refers to the nature of a worker's activities. Thus §2(3) used the phrase "longshorem[e]n or other person[s] engaged in longshoring operations" as one example of workers who engaged in maritime employment no matter where they do their job." 444 U.S. ____", 100 S. Ct. 328 at p. 335.

Once again affirming that longshoring operations are only a part of a larger group of activities that are considered maritime employment, the Supreme Court stated:

> .... But the language of §2(3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker ...." 33 U.S.C. §902(3). The petitioner's argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" comprise a part of the larger group of activities that make up "maritime employment." See Webster's New Collegiate Dictionary 581 (1973). 100 S. Ct 328 at p. 335 n.7.

Bernard Sullivan was employed in the construction of the foundation for the sewage treatment facility which extended at least 500 feet into the Hudson River to the pierhead. The employer utilized rotary drill barges, turn drill barges, tugboats and cargo type barges. The tugboats and barges brought supplies, steel and other cargo

to the site on the river.

Sullivan had worked continously for 16 months over, on and in actual water in the construction of the facility. Most of his period of employment was spent on the river working in actual navigable water. His assigned duties consisted of boarding barges to build caissons in the water, drilling caissons into the river bed and working on a barge dropping caissons into the river. Cargo type barges which carried construction material were towed to the site by tug-boats and moored to caissons in the river. One of Sullivan's duties was to assist in mooring the barges to the Caissons. Another of his assigned duties was to unload cargo, material and supp-lies from the barges, at least two or three times a week. In unloading the Cargo, he would board barges and use a

crane to unload steel. The cargo that was unloaded was then stacked by him on the pier or construction site.

The duties assigned to Sullivan by his employer to unload barges was the functional equivalent and identical with the tasks performed by longshoremen. If Sullivan or other similar employees did not unload the barges, longshoremen would have to be hired and such longshoremen would without question be covered under the Act as amended.

In addition to the continuous performance of his work on actual water which, in and of itself is uniquely maritime, his regular assigned duty of unloading barges was an indisputable longshoring operation. The equipment that he operated and his skills in unloading barges were similar to, if not identical with those used by longshore-

men, During his 16 months of employment on actual navigable water, he was exposed to the same risks and hazards as other maritime workers including longshoremen.

The 1972 amendments were designed to eliminate shifting coverage, that is to prevent the floating in and out of coverage by persons who move cargo from ship to land. Sullivan was assigned such work by his employer on a regular basis and if he is covered under the Act as amended for part of his activities, he would be covered for all.

The Supreme Court in P. C. Pfeiffer Company, Inc v. Ford, Supra, expressed this view as follows:

> "We believe that §2(3)'s explicit use of the terms "longshoreman" and "other person[s] engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally

> performed by longshoremen are within the purview of the 1972 Act. We do not suggest that the scope of maritime employment depends upon the vagaries of union jurisdiction. id, at 268, n.30, 97 S. Ct., at 2359, n.30. Instead, the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. id, at 267, n.28, 97 S. Ct. at 2359, n. 28[17]. A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process ....." 100 S. Ct 328 at 337.

The Supreme Court in P. C. Pfeiffer Company Inc. v. Ford further stated:

> Congress was especially concerned that some workers might walk in and out of coverage. Out observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of Northeast Marine Terminal v. Caputo, 432 U.S. at 273-274, 97 S. Ct.,

> at 2362-2363 that a worker is covered if he spends some of his time in indisputable longshoring operations and if, without the 1972 Act, he would be only partially covered. 100 S. Ct 238 at 337 n. 18.

Sullivan assigned duties of boarding barges and unloading cargo is identical with the work performed by longshoremen. He was an amphibious worker. These duties bring him within the purview of being an employee under §902(3) and within the Act's coverage.

The Second Circuit in Fusco v. Perini North River Associates, 622 F. 2d 1111 (1980) held that Sullivan, a water based marine construction worker was not engaged in maritime employment nor was he a harborworker within §902(3). As to the fact that he was not a harborworker, the Court reasoned that:

> To come within §2(3) a harborworker's activity must relate to ships, as is shown by the

> test of §2(3) which refers to a "harborworker including a shiprepairman, shipbuilder, and shipbreaker." 622 F. 2d at 1113.

This reasoning by the Court is dubious and should be reviewed. The Supreme Court in P. C. Pfeiffer Company Inc. v. Ford, supra, interpreted the word "including" in reference to longshoring operations to indicate that these operations comprise a part of the larger group of activities that make up maritime employment. Since the word "including" is used in §902(3) twice, once with reference to longshoring operations and secondly to harborworkers, it is reasonable to assume that it would have the same meaning, that is, that the word "harborworker" encompasses a larger group of activities of which shiprepairmen and shipbuilders are a part of.

The sewage treatment plant that

Sullivan was employed in constructing extended at least 500 feet into the river. It was not being built for scenic purposes. It's function was to clean the river and it had to be built there. There is no question that such a structure would alter the harbor of New York City and should, be considered a harbor facility. Sullivan's duties in connection with the erection of the substructure for this facility should constitute him as a harborworker.

The Second Circuit Court in deciding this case upon an occupational approach as dictated by P. C. Pfeiffer Company, Inc. v. Ford, supra, failed to consider that the situs and status tests required for maritime employment are related and under certain circumstances merge into one entity. This occurs when a worker's activities are water-based and his regular assigned duties are per-

formed on actual water. When the situs of the work moves on to land, the separate tests for situs and status separate and become distinct, and then only the worker's occupational activities can bring him within the status test required for maritime employment. Under the pre-amendment Act, all that was required for coverage was that the employee be injured on navigable water. It is difficult to perceive of a manner in which a water-based worker can have continuous and regular duties that are performed on actual water which are not maritime in nature.

In Odom Construction Company, Inc. v. United States Department of Labor, 622 F. 2d 110 decided on July 21, 1980, the United States Court of Appeals for the Fifth Circuit interpreting P. C. Pfeiffer Company, Inc. v. Ford, supra, held that a land based construction

worker who was engaged in a two-day job that required moving concrete blocks on the bank of a navigable canal was an employee engaged in maritime employment. At the time of his injury, he was standing on shore. The employer testified that 20% of his company's work involved bulkheading and piledriving and that he had a separate crew for that type of work. The Court in applying the Ford case stated:

> [1] First, the act of moving the blocks is maritime work. Section 902(3) lists harborworkers among the types of workers covered. It is at least arguable that the repair of moorings, even of those not adjacent to main docks, is a type of job that could be performed by a typical harborworker. Yet we need not hold that Maze was engaged in "harborworking" at the time of his injury, for §902(3) by its own terms states that longshoremen and harborworkers are not the only persons engaged in maritime employ-

> ment: Cf. P. C. Pfeiffer Co. v. Ford.... 622 F. 2d 110 at 112.
>
> .... Where as here, the claimant was doing maritime work that required him to go into the water and where a significant part of the employer's overall work, 20%, was maritime, the policy of the Act strongly favors coverage. 622 F. 2d at 113.

The Fifth Circuit Court discussing the 20% of the employer's workers who were involved in bulkheading and piledriving stated:

> Mr. Odom testified in the hearing before the ALJ that at the time of Maze's injury, approximately 20% of his company's work involved bulkheading and piledriving in navigable waters. He stated that he had a separate crew for that type of work and in fact had separately incorporated those operations before the hearing. If any member of this "maritime group" had been the claimant here, there would be no doubt about his status as a covered employee. 622 F. 2d at 113.

In the case at bar, 100% of the

work of Perini North River Associates consisted of driving caissons into the river bed and building a concrete pier on top of the caissons. Perini utilized tugboats, barges, drill barges and rafts and was more of a maritime employer than Odom Construction Company. Sullivan worked on actual navigable water, building and dropping caissons into the river and unloading barges for 16 months and his work was more of a maritime nature than Maze who was admittedly a landbased worker who only spent two days on the water.

The inequities in the Administration of the Act are glaringly patent and demonstrated in the case of Matson v. Perini North River Associates, BRB 78-563 decided by the Benefits Review Board on February 21, 1979, after the decision denying coverage to peti-

tioner Sullivan. Matson was employed as a dockbuilder by Perini, the same employer for whom Sullivan worked and on the same North River Pollution Control Project. Matson was involved in the Construction of a multi purpose pier which was located outside the foundation of the sewage treatment plant that Sullivan was working on. The pier was a part of the same complex and was to be used for the docking of barges to remove sludge from the sewage treatment plant. Matson's duties consisted in the driving of caissons, building forms, setting in the concrete slab and finishing the foundation.

The Administrative Law Judge denied coverage to Matson on the ground that he was not a harborworker. The Benefits Review reversed the decision and held that Matson was a harborworker

in the following statement:

> In Stewart v. Brown & Root Co., Inc., 7 BRBS 356, BRB No. 76-451 (Jan. 12 1978), the Board established a definition of the term "harbor-worker," as used in Section 2(3), to include "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which includes docks, piers, wharves and adjacent areas used in loading, unloading, repair or construction of ships)." Id. at 365. Herein, the record clearly establishes that claimant was engaged in the construction of a multi-purpose pier at which barges would be loaded. I therefore conclude that claimant satisfies the status test of Section 2(3) as a harbor worker. 3/ Moreover, claimant's employment further satisfies the Board's more recent test of maritime employment "that a claimant's employment must have a realistically significant relationship to maritime activities involving navigational commerce over navigable waters." Sedmak v. Perini North River Associates, 9 BRBS 378, BRB No. 77-B96 (Nov. 30, 1978) (Miller, Member, dissenting).

In the case at bar, Petitioner Sullivan was performing almost the identical duties performed by Matson on the same project for the same employer. The only difference was that Sullivan was working on the foundation for the sewage treatment plant while Matson was constructing the pier foundation which was to be used to dock barges to remove sludge from the plant. The sewage treatment plant was a necessary structure for the dock pier and one would be useless without the other. The Benefits Review Board held that the pier for the docking of barges was a harbor facility. Since both the sewage treatment plant and the pier were part of the same project, the inescapable conclusion is that Sullivan was also a harborworker. If Sullivan was assigned to work on the dock pier, he would be covered, however,

he would not be covered if he was assigned to work on the foundation for the sewage plant. The construction of the Act by the Benefits Review Board offends the thrust of the 1972 Amendments which were designed to eliminate bifurcated coverage.

CONCLUSION

For the reasons stated above, a Writ of Certiorari should issue to review the Judgment of the Second Circuit.

Respectfully submitted,

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